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No.

In the

SUPREME COURT OF THE UNITED STATES

WILLEM C. ONINK and MARSHA ONINK,

Petitioners,

v.

SAMUEL DUKE CARDELUCCI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRED J. KNEZ
Attorney of Record
LAW OFFICES OF FRED J. KNEZ
18493 Halter Lane
Post Office Box 70090
Riverside, CA 92513
(909) 789-1832
Attorney for Petitioners

AK PP

QUESTIONS PRESENTED

1. By use of the words, "interest at the legal rate" in 11 U.S.C. § 726(a)(5), did Congress intend to limit the recovery of post petition interest on a state judgment against a solvent debtor to the Federal Statutory rate under 28 U.S.C. § 1961(a) and thereby overrule this Court's long standing mandate in *Vanston Bondholders Protective Committee v Green*, 329 U.S. 156(1946) that the determination of post petition interest depends on the equities of each case?

2. Does the decision of the 9th Circuit conflict with important decisions of this Court and invoive an important Federal question which should be resolved by this Court?

PARTIES TO THE PROCEEDINGS

Petitioners are Willem C. Onink and his wife, Marsha Onink, Appellants below.

Respondent is Samuel Duke Cardelucci, Appellee and Judgment Debtor below.

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IN THE
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLEM C. ONINK and MARSHA ONINK, Petitioners, hereby respectfully request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

This dispute began in 1993 when Petitioners obtained a State Court judgment against Respondent and his rubbish companies for predatory pricing in

violation of California's Unfair Trade Practices Statute. The State Court entered a judgment in the sum of $5,423,825.50 plus interest at the State rate of 10% per annum. Respondent appealed the State Court judgment and, instead of posting a bond pending appeal, Respondent filed a voluntary petition for relief under Chapter 11 of the Federal Bankruptcy laws.

The State Court judgment was affirmed on appeal although the amount of damages was modified to $5,273,147.50 plus interest at the State interest rate of 10%. In subsequent bankruptcy proceedings, the parties agreed that Petitioners were entitled to post petition interest. However, the parties disputed whether the applicable interest rate was California's statutory interest rate of 10% or the Federal interest rate. The parties did not dispute that Respondent was and is solvent and that Petitioners were the only creditor.

The Bankruptcy Court ruled that the Federal interest rate of approximately 3.5% rather than the State judgment interest rate of 10% applied to Petitioners' State Court judgment. However, the Bankruptcy Court made clear that its decision was not based upon a determination of the equities between the parties but rather, the decision in *In re Beguelin*, 220 BR 94 (1998) which the Bankruptcy Court felt bound to follow. At the hearing on Petitioners' Motion for the award of post petition interest, the Bankruptcy Court acknowledged that all of the equities were on the side of Petitioners and that application of the Federal interest rate to the instant case was "disquieting;" that the system in this case "has been used in a way that it wasn't intended to be used;" that "as a court of equity, it doesn't fit real comfortably in this case;" that the Court was "reluctant" to apply the Federal rate; and that the concepts in

Beguelin are "troublesome concepts." [Excerpts of Record, pp 69,70,72] In short, the Bankruptcy Court, a Court of equity, felt its hands had been tied by the decision of the Appellate Panel of the Ninth Circuit under *In re Beguelin*, supra.

Petitioners appealed the decision of the Bankruptcy Court and, following *In re Beguelin*, the United States Court of Appeals for the Ninth Circuit, affirmed in a decision filed April 12, 2002. Petitioners petitioned for rehearing was denied on May 22, 2002.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1), and in particular, jurisdiction over federal questions concerning the meaning of 11 U.S.C.§ 726(a)(5) and whether a solvent State Court judgment debtor can use the bankruptcy laws to avoid application of State law governing interest on State judgments.

STATEMENT OF CASE

Respondent owns and operates several rubbish companies in Southern California including National Environmental Waste Corporation ["NEWCO"] and International Rubbish Service Inc. ["INTERNATIONAL"]. Beginning in 1986, Respondent engaged in predatory pricing in the County of Riverside thereby forcing several small rubbish companies out of business including Petitioners. On January 15, 1993, a State Court jury found by unanimous verdict that Respondent, NEWCO and INTERNATIONAL were jointly and severally liable to Petitioners for intentionally selling rubbish collection services below cost with the specific intent and purpose of destroying competition. Such conduct constitutes an Unfair Trade Practice in violation of California State Statute. See *California Business & Professions Code* §

17043.

Following entry of judgment of $5,423,825.50, Respondent, NEWCO & INTERNATIONAL brought an appeal to the Fourth Appellate District of the State of California, Division Two. Shortly thereafter, on May 3, 1993, Respondent filed a Petition for Reorganization under Chapter 11. Respondent then requested a modification of the automatic stay to facilitate his appeal of the jury's verdict in the State Court.

In February 1996, the State Court of Appeal affirmed the judgment on all liability issues but remanded the case to the trial court for recalculation of damages. Following a recalculation of damages at $5,448,647.50, Respondent again appealed to the Court of Appeals. In June 1999, and with one slight modification, the Court of Appeal affirmed the trial Court's recalculation of damages at $5,273,147.50.

Respondents' petitioned for review to the California Supreme Court was denied in November 1999.

On December 29, 1999, Petitioners brought a Motion before the Bankruptcy Court for an order awarding post petition interest. The Bankruptcy Court determined that Appellants were entitled to post petition interest on their State Court judgment but held that under *In re Beguelin*, 220 BR 94 (1998) the applicable interest rate for distributions on Respondent's State Judgment was the interest rate for Federal judgments rather than the State judgment rate. As aforesaid, at the hearing on the Motion the Bankruptcy Court felt that its hands were tied by the Ninth Circuit's decision in *In re Beguelin*, supra, and that the Bankruptcy law "has been used in a way that it wasn't intended to be used."

Petitioners appealed the decision of the Bankruptcy Court and the Ninth Circuit affirmed. [See

Appendix A] The decision of the Ninth Circuit followed the prior decision of the Bankruptcy Appellate Panel of the Ninth Circuit in *In re Beguelin*, supra, that application of the Federal interest rate in all cases promotes "fairness among creditors" and "is the most judicially efficient and practical manner of allocating remaining assets." [Appendix A, p 5529] In the decision, the Ninth Circuit interprets the words, "interest at the legal rate" under 11 U.S.C.§ 726(a)(5) to mean interest at the Federal interest rate because Congress used the definite article "the" instead of the indefinite article "a" or "an" which according to the Ninth Circuit means that Congress intended a "single source" to be used to calculate post petition interest. [Appendix A, p 5527] In the decision, the Ninth Circuit acknowledges that the debtor in this case is solvent and there are not conflicting claims by multiple

creditors. In fact, the Court states the following in its decision:

> "The Court recognizes that these two interests, fairness among creditors and administrative efficiency, may be of limited relevance in certain bankruptcy proceedings. Where there are only a few unsecured creditors seeking post petition interest and there are sufficient assets to pay all claims of all interest, there will be no concerns regarding equity among creditors or practicality. In those instances, a debtor may receive a windfall from the application of a lower federal interest rate to an award of post judgment petition interest." [Appendix A, pp 5529-5530]

Despite the foregoing statement by the Court and after a lengthy discussion of the reasons why 11 U.S.C.§ 726(a)(5) should be *interpreted* to mean interest at the *Federal* interest rate, the Ninth Circuit then summarily states:

> "None the less, 'interest at the legal rate' is a statutory term with a definite meaning that cannot shift depending on the interest invoked by the specific factual circumstances before the court. (See In re Thompson, 16 F. 3d 576, 581 (4th Cir. 1994)" [Appendix A, p 5530]

REASONS FOR GRANTING THE WRIT

A. THE NINTH CIRCUIT'S INTERPRETATION OF 11 U.S.C.§ 726(a)(5) IS ERRONEOUS IN THAT CONGRESS DID NOT INTEND BY USE OF THE WORDS, "INTEREST AT THE LEGAL RATE" TO LIMIT THE RECOVERY OF POST-PETITION INTEREST ON STATE JUDGMENTS AGAINST SOLVENT DEBTORS TO THE FEDERAL STATUTORY

RATE UNDER SECTION 28 U.S.C.§ 1961(a).

If Congress truly intended to limit post-petition interest on State Court judgments to the Federal interest rate then Congress would have simply said: "interest at the Federal rate." This is true for several reasons: **First**, Congress has specified a particular interest rate in other instances. See, for example, 28 U.S.C. § 1785(g); 28 U.S.C.§§ 6601, 6611, 6612; 42 U.S.C.§ 1322. Had Congress intended the words "legal rate" to be the rate applied to Federal judgments it would have simply said, interest at the Federal rate or interest at the rate provided under Federal law or, interest at the rate provided under 28 U.S.C. § 1961(a).

Second, Congress was aware of the conflicting lines of authority on the issue of post-petition interest and if Congress intended to resolve this conflict by adopting the Federal rate approach, then Congress

would have used language which would have clearly expressed that intent. General principles of statutory construction provide for the presumption that Congress had a full awareness of the prior application of interest based on principles of equity and is presumed to have read and considered the numerous cases emphasizing the underlying policy that such decisions balance the equities between creditor and creditor and between creditor and debtor. See *In re Kentucky Lumber Co*, 860 F.2d 674 (6th Cir 1998, citing *In re Boston & Marine Corp*, 719 F. 2d 493, 496 (1st Cir 1983)). Therefore, if Congress had intended to resolve the conflict then Congress would have used words that would have clearly expressed the intention of Congress to adopt the Federal interest rate approach.

Third, the Ninth Circuit decision argues that when the words "legal rate" have been used by

Congress in the past, Congress has intended to refer to the "statutory rate" of interest. If this were true, then Congress would have used the words "Federal statutory rate." It does not follow that Congress would use the words "legal rate" on the *assumption* that courts would subsequently "interpret" such language to mean the Federal interest rate when Congress could have simply use the words "Federal interest rate."

Fourth, there is no evidence that Congress intended to change prior law. There is nothing in the legislative history to section 726(a)(5) to suggest an intention by Congress to change prior law. In the context of interpreting other provisions of the Bankruptcy Code, this Court has observed, "it is most improbable that a change in the existing Bankruptcy rules would have been made without even any mention in the legislative history." *United States v Ron Pare*

Enterprises Inc. (1989) 489 U.S. 235, 254, 109 S. Ct. 1026, 103 L. Ed. 2d 290, citing *United States Savings Association of Texas v Timbers of Inwood Forest Associates, LTD*, 484 U.S. 365, 380 (1988).

Fifth, the fact that Congress did not use the word "Federal" in 11 U.S.C. § 726(a)(5) strongly suggests that Congress did not intend to limit the interest permitted by law to the Federal statutory rate under 28 U.S.C. § 1961(a). Rather, use of the words "interest at the legal rate" reflects an intention by Congress to recognize that the rate will depend on the equities of each case. (See further discussion below).

Finally, the Ninth Circuit's interpretation is not consistent with the overall policy and purpose of the Bankruptcy law. It is reasonable to presume that Congress would be mindful of the added financial burden on the Bankruptcy system not to mention the

inequities to creditors where a solvent debtor seeks to avoid either a higher interest rate under State statutory law or a rate of interest specified in a contract between the creditor and solvent debtor. In the absence of any supporting legislative history, it is not reasonable to say that Congress intended to create a mechanism for solvent State judgment debtors to shop for a lower interest rate through the Bankruptcy system at the expense of Federal tax payers and to the prejudice of their creditors.

B. THE NINTH CIRCUIT'S DECISION IS REPUGNANT TO THIS COURT'S DECISION IN *VANSTON BONDHOLDERS PROTECTIVE COMMITTEE v GREEN* AND THE LONG STANDING RULE OF BANKRUPTCY LAW THAT DECISIONS REGARDING INTEREST IN BANKRUPTCY MUST BALANCE THE EQUITIES BETWEEN CREDITOR AND CREDITOR *AND BETWEEN CREDITOR AND DEBTOR*.

Petitioners' Opening Brief to the Ninth Circuit squarely presented to the Court the issue under this

Court's decision in *Vanston Bondholders Protective Committee v Green*, 329 U.S. 156, 67 S. Ct. 237, 91 L. Ed. 162 (1946) and in particular, this Court's holding therein, that it is "manifest" that each decision regarding interest in Bankruptcy must balance the equities between creditor and creditor and between creditor and debtor. Although the issue regarding interest in the *Vanston Bondholders* case was different from the instant case, the requirement that "each decision" regarding interest requires a balancing of equities, has remained constant. No decision of this Court has ever deviated from this fundamental rule that the equities be balanced between creditor and creditor *and between creditor and debtor*. In *Vanston v Bondholders*, this Court noted that cases have in the past determined that where the estate was "ample to pay all creditors and to pay interest even after the Petition was filed, equitable

considerations were invoked to permit payment of interest to the secured creditor rather than to the debtor. [329 U.S., at 164-165] Although the Ninth Circuit's decision makes reference to this Court's decision in *Vanston Bondholders*, no where in the opinion is there any explanation as to how Congress could have possible intended by use of the words "interest at the legal rate" to set aside a long standing rule of law requiring the balancing of equities in every decision involving the issue of interest. The Ninth Circuit's decision offers no valid explanation for a departure from this long standing rule of law. It does not point to any legislative history to 11 U.S.C.§ 726(a)(5) which would justify the Ninth Circuit's decision. Nor does the Court offer any explanation in its decision as to how the language in 11 U.S.C. § 726(a)(5) can have a "definitive meaning" when the Court itself found it necessary to engage in an

analysis and interpretation before determining that the words "interest at the legal rate" was intended by Congress to mean interest at the Federal interest rate under 28 U.S.C.§ 1961(a).

C. THE LANGUAGE OF 11 USC § 726(a)(5) REFLECTS THE RECOGNITION BY CONGRESS THAT THE APPROPRIATE RATE OF INTEREST DEPENDS ON THE FACTS AND EQUITIES OF THE PARTICULAR CASE.

It should be apparent that Congress intentionally used the words "interest at the legal rate" because Congress recognized that each case would be unique and rest on its own facts. This is seen from a review of the many, conflicting published decisions on the meaning of the term "legal rate of interest," as provided by Section 726(a)(5). Some Courts have followed what is commonly referred to as the "state law approach." Specifically, if a contract exists between the debtor and creditor that establishes an interest rate on the

outstanding balance, the contract rate is the "legal rate." See such as, *In re Schoeneberg*, 156 BR 963, 972 (Bankr. W D Tex. 1993). If a specific state statute exists that establishes a rate of interest for a creditor, the state interest rate is the "legal rate." See *In re Schaffer Furniture Co.*, 68 BR 827, 931 (Bankr. ED PA. 1987).

Other courts follow the so called "Federal judgment rate approach" and suggest that the legal rate is the rate of interest established by 28 USC § 1961. See, *In re Godsey*, 134 BR 865, 867 (Bankr. MD Ten 1991).

An analysis of the facts underlying the cases reveals that certain factors have triggered most of the decisions. For instance, *most* of the cases following the State judgment interest approach have involved a *solvent* debtor. See, *In re Carter*, 220 BR 411 (BKRTZY. DNM. 1998); *In re A & L Properties*, 96

BR 287 (CD Cal. 1988); *In re Beck*, 128 BR 571 (Bankr. 1991); *In re San Joaquin Estates*, 64 BR 534 (9th Cir BAP 1986); *In re Schoeneberg*, 156 BR 963 (Bankr WD Tex. 1993); and, *In re Schaffer Furniture Co.*, 68 BR 827 (Bankr ED PA 1987). The reason most often given by these Courts is best expressed by the Court in *In re A & L Properties*:

> ". . . where a debtor has contracted for a rate of interest, and has sufficient funds to pay the bargained for amount, the creditor is entitled to the agreed upon rate. Under any other result, the debtor would be permitted to retain value directly at the expense of the creditor. Ordinarily, bankruptcy laws and rules affect the rights of creditors in favor of or at the expense of other creditors by

changing the rules that would prevail outside a Bankruptcy Court in order to more equitably allocate the values of the debtor among the creditors. The alteration of a valid, binding, and legal contractual obligation, so that the debtor retains non exempt property prior to the payment of its valid debts, is a legally startling and somewhat appalling result. Under this 'legal rate' theory, the Bankruptcy Code effectively states that the statutory rate of interest is preferred to the rate of interest to which the parties have themselves agreed and that the difference should be retained by the debtor. There does not appear to be any substantial policy consideration that

would sanction this result...

* * * * * * *

". . . Where the debtor's estate proves solvent, a contract creditor is entitled to post-petition interest at the rate set forth in the contract. This rate is the 'legal rate' for purposes of section 726(a)(5)."

[96 BR, at 290]

Most cases following the Federal judgment interest rate approach involve an *insolvent* debtor and *multiple* creditors with varying contractual interest rates. See *In re Melenyzer*, 143 BR 829 (Bankr WD Tex 1992) and *In re Godsey*, 134 BR 865 (Bankr MD Ten 1991). These cases have emphasized that where there are multiple creditors, a Federal judgment interest rate applicable to all provides for "fairness among creditors." Representative of the explanation given by these Courts is the following statement from *Melenyzer*,

supra:

> "The problem with the State law approach is that different creditors will have different rates of interest, depending upon their contracts or the applicable statutory rate. One contract might provide for interest at 18%, another at 9%, one State statute might set the rate at 10%, another applicable statute a rate of 6%. . . . .
>
> "Quite often, . . .there are only enough assets to pay *some* interest to the creditors, *not* enough to pay *all* creditors *all* the interest they claim at their contract or statutory rates. Using those rate [sic], some creditors would receive a disportionately large percentage of the

remaining assets compared to their underlying unsecured claims, to the prejudice not of the debtor, but of other, otherwise equally situated, unsecured creditors." [143 BR, at 832]

Cases following the Federal judgment interest rate argue that the foregoing concerns over multiple creditor claims and insufficient funds to satisfy all individual interest claims, dictates application of a single Federal judgment interest rate because it facilitates fairness among creditors and provides a simple solution. But where the debtor is solvent and there is no issue regarding conflicting creditor claims over insufficient funds, the rationale underlying application of the Federal judgment interest rule simply does not exist.

D. THE REASONING OF *BEGUELIN* IS REPUGNANT TO FUNDAMENTAL

PRINCIPLES OF BANKRUPTCY LAW WHEN APPLIED TO THE INSTANT CASE.

Application of the Federal judgment interest rule to cases where the debtor is solvent and there is no concern regarding multiple conflicting creditor claims on insufficient funds, violates the overriding policy governing the allowance of post-petition interest in bankruptcy that any decision balance the equities between creditor and creditor *and between creditor and debtor*. See *In re Kentucky Lumber Co*, 860 F2d 674 (6th Cir 1998), citing *In re Boston & Maine Corporation,* 719 F2d 493, 496 (1st Cir 1983). The Court in *In re Beguelin*, supra, failed to analyze the rate of interest issue in conjunction with the policy of achieving fairness both between creditors and *between the creditor and debtor*. The Court in *Beguelin*, relied upon the decisions in *In re Melenyzer* and *In re Godsey* even though those cases involved an *insolvent* debtor

and multiple creditors. Thus, the Court in *In re Carter*, supra, criticized the Court in *Beguelin* for having "overlooked the underlying policy of the Code to avoid producing a windfall for the debtor. The Court in *In re Carter* states:

> "It appears to this Court that, in reaching its conclusion, the Beguelin Court may have overlooked the underlying policy of the Code to avoid producing a windfall for the debtor. As noted earlier, the Code provides that if there is a surplus produced by the estate after all claims are paid, then interest should be paid out on those claims before any surplus is returned to the debtor. Under the facts of this case, if the Court were to modify the originally contracted for

interest rate as suggested in Beguelin, it would result in a windfall to the debtor in that property would be returned to the debtor at WCB's expense. To that end, this Court holds that in situations such as the one at bar, if the solvent estate produces a sufficient surplus from which to pay interest in full to all claimants at the rates prescribed in underlying agreements, contracts, or judgments, then that is the interest rate that should be applied by the Court. We do not have to determine what interest rate should be applied when there is not a sufficient surplus to pay interest in full at contract rates to all claimants. It seems, however, in that situation, the

reasoning contained in Beguelin might be applicable." [220 BR, at 416-417]

In the instant case, the debtor's conduct in 1986 forced Appellants out of the rubbish business in 1987. After obtaining a judgment against the debtor in January 1993, the debtor prolonged recovery on the judgment for more than 6 years and will obviously obtain a windfall if allowed to avoid the State interest rate of 10% on the judgment. None of the cases discussing this issue have ever suggested that Congress intended by use of the words "interest at the legal rate" to provide a mechanism for State judgment debtors to avoid State interest rates by bringing a Chapter 11 Bankruptcy Petition. Bankruptcy laws were never intended to allow a State judgment debtor to shop for a lower interest rate through the Bankruptcy Courts or receive a windfall from pursuing a Bankruptcy Petition.

Any interpretation of section 726(a)(5), must necessarily take into consideration the overall purpose of the Bankruptcy laws and the policy considerations of fairness among creditors as well as fairness between creditor and debtor. This is consistent with the mandate of the US Supreme Court that post-petition interest is dependent upon the **equities of the case.** See *Vanston Bond Holders Protective Committee v Green*, 329 US 156, 67 S Ct 237, 91 L Ed 162 (1946).

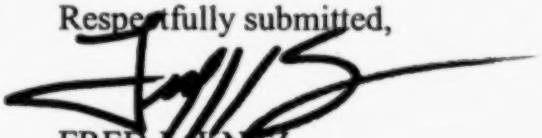
CONCLUSION

In the instant case, Respondent's conduct forced Petitioners out of business thirteen years ago and even though they obtained a judgment in January 1993, Respondent managed to delay Petitioners' recovery of their State judgment for another six and a half years. Imposition of a Federal judgment interest rate of approximately 3.5% as opposed to the 10% required

under State law, clearly provides a windfall to Respondent.

Where the debtor is solvent or there are sufficient funds in the estate to pay interest in full to all creditors at the rates prescribed in the underlying agreements between the debtor and creditor or the rate prescribed by the applicable State statute, then that interest rate is the legal rate of interest for purposes of post-petition interest. This rule recognizes and gives preference to the mandate of this Court that post-petition interest is dependent upon the **equities** of the case. The judgment should be reversed.

Respectfully submitted,



FRED J. KNEZ
Attorney of Record
LAW OFFICES OF FRED J. KNEZ
18493 Halter Lane
Post Office Box 70090
Riverside, CA 92513
(909) 789-1832